AT

UNITED
NATIONS

Administrative Tribunal

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8 July 1994

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 636

Case No. 713: NOLL-WAGENFELD

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, Vice-President, presiding; Mr. Francis Spain; Mr. Mayer Gabay;

Whereas at the request of Meike Angelika Noll-Wagenfeld, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 30 November 1992, the time-limit for the filing of an application to the Tribunal;

Whereas, on 19 November 1992, the Applicant filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 8 February 1993, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal, to order the Respondent to, inter alia:

"...

(i) ...announce ... the addition of the Applicant's name to the 1987 P-5 (Senior Officer) Promotion Register;

(ii) ...rescind [the] decision ... that the effective date of [the Applicant's] promotion should ... be ... 1 April 1992;

(iii) ...implement the Applicant's promotion to the P-5 level, under the 1987 promotion review retroactive to 1 October 1987, ...

(iv) ...restore to the Applicant the seniority in grade and emoluments of which she has been deprived as a consequence of:

(a) The failure of APB [Appointment and Promotion Board] to give full and fair consideration to her eligibility for promotion under the 1987 promotion review; and

(b) The arbitrary and discriminatory decision to establish the effective date of her promotion at 1 April 1992 and not earlier;

(d) In the event that the Secretary-General decides, in the interest of the United Nations, to pay compensation for the injury sustained in accordance with the option given to him under article 9, paragraph 1, of the Statute, the Applicant requests compensation as follows:

An amount equivalent to the difference between the salary and emoluments received for the period 1 October 1987 to date and ... [what] she would have received had she been promoted to the P-5 level effective 1 October 1987."

Whereas the Respondent filed his answer on 13 July 1993;

Whereas the Applicant filed written observations on 1 September 1993;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 1 October 1975, on a probationary appointment at the P-3, step 1 level, as a Human Rights Officer in the Division of Human Rights at the United Nations Office in Geneva (UNOG). On 1 October 1977, she received a permanent appointment and she was promoted to the P-4 level, with effect from 1 April 1980.

On 1 September 1986, the Applicant was transferred to the Office of the Director General as "Assistant to the Director-

General". On 14 October 1986, the Director-General recommended the Applicant's promotion to the P-5 level in connection with the 1986 promotion review exercise. He noted that she would assume "the duties vacated by ... and by May 1987, she will replace ... as Senior Legal Officer."

On 17 June 1987, the Assistant Secretary-General for Human Resources Management announced to the staff, in information circular ST/IC/87/35, the 1986 Senior Officer (P-5) Promotion Register. The Applicant's name was not included therein. The Applicant subsequently instituted a recourse procedure in accordance with paragraph 4 of ST/IC/87/35, against the non-inclusion of her name in the 1986 Senior Officer Promotion Register, but was unsuccessful.

On 28 July 1987, the Officer-in-Charge of UNOG announced in information circular No. 3425, that the Applicant had been appointed Senior Legal Officer, with effect from 1 April 1987.

In a memorandum dated 3 June 1988, the Director-General recommended that the Applicant be promoted to the P-5 level, in connection with the 1987 promotion review exercise. He noted in his recommendation that the Applicant "has proven to be a very professional, capable and thorough incumbent of the post which is classified at the P-5 level".

On 22 May 1989, the Assistant Secretary-General for Human Resources Management announced to the staff, in information circular ST/IC/89/37, the 1987 Senior Officer (P-5) Promotion Register. The Applicant's name was not included. On 21 June 1989, the Applicant instituted a further recourse procedure against the non-inclusion of her name in the Register, in accordance with paragraph 4 of ST/IC/89/37. In her letter of recourse addressed to the Chairman of the Appointment and Promotion Board (APB), the Applicant argued that since her performance had been fully satisfactory, she could only assume that the Board had taken other facts into account, found in United Nations Administrative Tribunal Judgement No. 410, in deciding not to include her name in the Register. In this

Judgement, rendered on 13 May 1988, the Tribunal held that the Applicant was not entitled to receive payment of her salary at the dependency rate and a dependency allowance in respect of two of her children as her husband, who was an employee of the International Telecommunication Union, was also receiving his salary at the dependency rate in respect of their elder daughter and such payment constituted duplicate payment of dependency benefits, prohibited under the Staff Rules.

She added: "if after having carefully considered my explanations as to UNAT Judgement No. 410, ... you nevertheless believe that my behaviour amounted to misconduct and should be sanctioned, then please refer my case to the Secretary-General proposing that the allegations be examined by a Disciplinary Committee as foreseen by the Staff Rules and Regulations." She concluded by stating that to take into account Judgement No. 410 "in order to justify" the non-inclusion of her name in the Register "would amount to demotion, a disciplinary measure which can only be applied as a result of disciplinary proceedings."

In a letter dated 7 December 1989, the Chairman of the APB informed the Applicant that, notwithstanding the additional information presented to the APB, the APB had decided that there were no grounds to amend its previous recommendation not to include her name in the 1987 P-5 Promotion Register.

In a letter dated 3 January 1990, the Applicant requested the Secretary-General to review the administrative decision not to include her name in the 1987 P-5 Promotion Register. In a reply dated 20 March 1990, the Director, Staff Administration and Training Division, Office of Human Resources Management, wrote to the Applicant, inter alia, as follows:

> "...
>
> It has been the function of the Appointment and Promotion bodies to evaluate the promotion recommendations

made by the relevant department, to consider all the staff members having the required seniority in the light of the criteria set out in the Staff Regulations, and to submit their recommendation to the Secretary-General for his decision. In evaluating the recommendation for your promotion, the Board could properly take into account Judgement No. 410 previously rendered by the Administrative Tribunal. The definition of the standards applicable to all staff members, which was contained in that judgement, did not involve any issue of fact which would have required the intervention of the Joint Appeals Board. The decision not to recommend you can in no way be seen as a 'demotion', as you characterize it, since you have remained at the level which was yours when the judgement was rendered."

On 27 April 1990, the Applicant lodged an appeal with the Geneva Joint Appeals Board (JAB). The JAB adopted its report on 9 December 1991. Its conclusions and recommendation read, in part, as follows:

"35. ...the Panel concludes:

(a) That the guidelines for the 1987 promotion review are applicable to the Appellant's case;

(b) That prima facie the criteria for promotion contained in the guidelines for the 1987 promotion review had been fully met by the Appellant;

(c) That it was not justified to take into account certain statements of Judgement No. 410 as a basis for the non-recommendation for promotion of the Appellant.

36. Therefore, the Panel unanimously recommends to the Secretary-General that the Appellant's case for promotion be reconsidered fully, fairly and objectively under the guidelines for the 1987 promotion review, taking into account the conclusions of the Panel."

On 31 January 1992, the Director, Office of the Under-Secretary-General for Administration and Management, transmitted to the Applicant a copy of the JAB report and informed her as follows:

"The Secretary-General has re-examined your case in the light of the Board's report. He shares the Board's conclusion that your case fell within the guidelines of the 1987 promotion review and that you should, therefore, have been given full consideration for promotion under the 1987 review. Due to the procedural grounds, which were given as one of the reasons for the rejection of your case, such full consideration would appear not to have been given. At the same time, the Secretary-General wishes to reaffirm that, in accordance with regulation 4.5, the paramount consideration in promotion shall be the necessity of securing the highest standards of efficiency, competence and integrity.

The Secretary-General has decided, accordingly, that your case should be remanded to the Appointment and Promotion Board (APB) for full and fair consideration of your eligibility for promotion under the 1987 review taking into account all relevant criteria. If the outcome of this review is not positive, the APB should be requested to consider your promotion within a reasonable period thereafter as an exception to the Vacancy Management System."

On 6 July 1992, the Under-Secretary-General for Administration and Management informed the Applicant as follows:

"Further to the decision of the Secretary-General regarding your appeal, which was conveyed to you on 31 January 1992, the Appointment and Promotion Board has completed its consideration of your candidature for promotion to P-5 level.

Having reviewed the facts relating to your case (the Administrative Tribunal Judgement No. 410, the Geneva JAB recommendations...) as well as the recommendation of the Appointment and Promotion Board that the promotion date not be retroactive but be closer to the date of the Board's deliberations on the case, I have decided, on behalf of the Secretary-General, that the effective date of your promotion to the P-5 level shall be 1 April 1992.

This constitutes the full implementation of the decision conveyed to you on 31 January 1992. ..."

The Applicant's promotion to the P-5 level was implemented with effect from 1 April 1992.

On 8 February 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. As the Respondent determined that the Applicant met all relevant criteria for promotion under the 1987 promotion review exercise, he must consider that the Applicant fully merits promotion under that review insofar as all the necessary criteria under the Staff Regulations and specific guidelines for that review have been met.

2. The determination of the effective date of promotion from the annual promotion registers has never been a function of the date on which the APB conducts its deliberations.

3. The recommendation by the APB that the effective date of promotion should be "closer to the date of the Board's deliberations" and the Respondent's decision that such date should be 1 April 1992, are arbitrary and discriminatory and constitute a punitive measure.

Whereas the Respondent's principal contention is:

The decision on the effective date of the Applicant's promotion lies within the Respondent's discretion, which he properly exercised in the present case.

The Tribunal, having deliberated from 30 June to 8 July 1994, now pronounces the following judgement:

I. The Applicant appeals from a decision by the Respondent dated 6 July 1992, promoting her to the P-5 level, with effect from 1 April 1992. The Applicant contends that this action violated her rights because her promotion was not made retroactive to 1 October 1987, the earliest possible date established in information circular

ST/IC/89/37, dated 24 May 1989, for promotion from the 1987 register. The Applicant thus asks for the seniority in grade and emoluments to which she would have been entitled had she been promoted to the P-5 level, with effect from 1 October 1987. In the alternative, if she is to receive only compensation, the Applicant asks that it be equivalent to the difference between her salary and emoluments for the period from 1 October 1987 to date and the salary and emoluments, including appropriate step increments which she would have received if she had been promoted to the P-5 level, with effect from 1 October 1987.

II. The broad issue raised by the Applicant is whether the Respondent's decision, dated 6 July 1992, constituted an abuse of discretion. It is well settled by the Tribunal's jurisprudence that promotions of staff members are not matters of right but are within the discretion of the Respondent. This is equally so with respect to the effective date of a promotion. The Tribunal has held repeatedly that qualifications, experience, performance reports, and all other factors relevant to promotion are appraised freely by the Secretary-General and that the Tribunal will not substitute its judgement concerning such matters. The Tribunal has also made it clear that the discretion of the Secretary-General must be exercised within the applicable legal norms and that it cannot be improperly motivated or exercised in an arbitrary or discriminatory manner. Hence, the specific question for examination by the Tribunal is whether the Respondent's decision not to make the Applicant's promotion retroactive to 1 October 1987 was unlawful because of wrongful motivation or because it was arbitrary or discriminatory.

III. The Tribunal notes at the outset that the information circular referred to above, on which the Applicant relies, did not mandate that promotions made as a result of the 1987 promotion review be with effect from 1 October 1987. That date was merely

described as the earliest possible effective date for promotion from the 1987 register. It did not prohibit a later effective date. Accordingly, there is no question in this case of inconsistency between the effective date of the Applicant's promotion and a date required by a rule, regulation, or binding administrative issuance.

IV. When the Applicant was first considered for a promotion in connection with the 1987 promotion review, it appears that she did not receive a favourable recommendation for two reasons. First, it was thought that she was not eligible because of limitations associated with the institution of the Vacancy Management System. In addition, Judgement No. 410, Noll-Wagenfeld, dated 13 May 1988, was evidently taken into account as bearing on whether the Applicant had met the highest standards of efficiency, competence, and integrity. The Applicant submitted an extensive recourse to the Chairman of the APB, setting forth her views with regard to Judgement No. 410 and, in particular, matters raised by some aspects of the case involving her integrity. The APB, by a letter to the Applicant dated 7 December 1989, from its Chairman, informed her that it had given full and careful consideration to the information contained in her recourse, but had concluded that it did not provide grounds for amending its previous recommendation.

V. The Applicant then submitted her case to the Joint Appeals Board (JAB). The JAB concluded that the Administration had erred in believing that the Applicant was not eligible for promotional consideration because of the limitations related to the Vacancy Management System. It also concluded that Judgement No. 410 was an extraneous factor which should not have been taken into account by the APB or the Respondent. The JAB recommended that the Applicant's case for promotion be considered fully, fairly, and objectively under the guidelines for the 1987 promotion review, taking into account the JAB's conclusions.

VI. The Respondent, by a decision dated 31 January 1992, informed the Applicant that he shared the JAB's conclusion that her case fell within the guidelines of the 1987 promotion review and that she should have been given full consideration under it. At the same time, the Respondent reaffirmed that, in accordance with staff regulation 4.5, the paramount consideration in promotion "shall be the necessity of securing the highest standards of efficiency, competence, and integrity." The Applicant's case was then remanded to the APB for full and fair consideration of her eligibility for promotion under the 1987 review, taking into account all relevant criteria. That review and the APB recommendation that the promotion date not be retroactive, but be closer to the date of the APB's deliberations, led to the decision dated 6 July 1992, being appealed by the Applicant.

VII. Reduced to its essentials, the Applicant's position is that the Tribunal should hold that, in considering the effective date of her promotion, the Respondent could not lawfully take into account facts surrounding the Tribunal's Judgement No. 410. However, for the Tribunal to so hold would be tantamount to substituting its judgement for that of the Secretary-General with respect to the facts to be taken into account in considering a promotion. That, as the Tribunal's jurisprudence establishes, is not the role of the Tribunal. The Tribunal finds that it was proper for the Respondent to consider the facts surrounding Judgement No. 410 to be relevant. It was therefore neither arbitrary nor discriminatory for the Respondent to take them into account in exercising his discretion regarding the effective date of the Applicant's promotion. Contrary to the view of the JAB, those facts are not an extraneous factor that the Respondent was compelled to ignore in deciding whether and the extent to which the "highest" standards were met by the Applicant, or as to the manner in which the Respondent should exercise his discretion regarding the effective date of her

promotion. It would be an unwarranted intrusion for the Tribunal to hold that the Respondent was required in such a context to disregard facts regarding a staff member's past conduct, whether or not that conduct happened to be involved in a prior Tribunal decision. What was said about those facts in Judgement No. 410, as well as what was said by the Applicant in her recourse, comprised material relevant to the criteria for promotion and the Respondent was entitled to appraise that material freely. That is what was done.

VIII. With respect to decisions involving promotions or their effective date, the Secretary-General's discretion is necessarily judgemental. So long as it is not tainted by arbitrariness, bias, discrimination, mistake of fact, or other extraneous factors, it will not be overturned by the Tribunal. In this case, the Tribunal is unable to perceive the presence of any such flaws.

IX. For the foregoing reasons, the application is rejected.

(Signatures)

Jerome ACKERMAN
Vice-President, presiding

Francis SPAIN
Member

Mayer GABAY
Member

Geneva, 8 July 1994

R. Maria VICIEN MILBURN
Executive Secretary